

HB

460

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: HB 460
() Publish Date: _____

Revision Date/Time (Note if correction): 4/19/02 3:16 PM Dept. Affected: Law
Title "An Act relating to actions for monopolies and BRU Civil Division
restraint of trade, including proof of damages; amending . . ." Component Fair Business Practices
Sponsor Representative Croft
Requester House Judiciary Committee Component No. 2206

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()	*****	*****	*****	*****	*****	*****
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
HB 460 updates Alaska antitrust statutes consistent with a recent United States Supreme Court precedent to allow the attorney general to bring a cause of action on behalf of both direct and indirect purchasers. Current Alaska statutes allow a cause of action only for purchasers who buy directly from the person or manufacturer that violated antitrust statutes. Because these type of actions typically involve civil actions on behalf of numerous persons and sometimes on behalf of numerous governmental entities, the bill provides for proof of antitrust damages by way of statistical methods consistent with federal law. The bill also removes the current requirement in the antitrust statutes that any antitrust plaintiff must prove willful conduct before a court may award treble damages. Federal law does not have this requirement, encouraging plaintiffs to resolve issues important to Alaska businesses and consumers in federal court, rather than state court.

These are actions the attorney general pursues under current law, and increasing the number of purchasers represented in those actions is not anticipated to increase costs for the Department of Law. Revenues associated with passage of this bill will depend on the number and complexity of actions brought by the attorney general in any given year and are too speculative to quantify.

Prepared by: Joan M. Kasson Phone (907) 465-5370
Division: Attorney General's Office Date/Time 4/19/02 3:16 PM
Approved by: Kathryn Daughettee for Bruce M. Botelho, Attorney General Date 4/19/2002
Agency: Department of Law

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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April 18, 2002

The Honorable Norman Rokeberg, Chair
House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

RE: HB 460 – “An Act relating to actions for monopolies and restraint of trade, including proof of damages; amending Rule 82, Alaska Rules of Civil Procedure; and providing for an effective date”

Dear Representative Rokeberg:

I write today to request that you schedule HB 460 – “An Act relating to actions for monopolies and restraint of trade, including proof of damages . . .” for a hearing at the earliest possible time. As you know, from the Labor and Commerce Committee hearing yesterday, this legislation, which is often referred to as an “Illinois Brick Repealer,” updates the Alaska antitrust statutes to provide a statutory basis for the attorney general to bring *parens patriae* actions for violations of antitrust statutes on behalf of state businesses, residents, and governmental entities as indirect purchasers.

Currently, the State of Alaska, through the attorney general, does not have authority to bring an action on behalf of consumers for “indirect damages.” Indirect damages are damages that a consumer may suffer because of an antitrust violation that occurred “upstream” from the consumer transaction. Alaska has been involved in several multi-state antitrust actions in the last several years. The claims Alaska has been able to assert in these cases, however, have been limited to claims on behalf of state agencies that have been directly harmed by the alleged illegal conduct; we have not been able to act to benefit individual Alaskans. For example, Alaska lost out on several hundred thousand dollars in consumer relief in the recent “Vitamins” case, which involved allegations of illegal contracts between vitamin manufacturers.

Passage of HB 460 would give the attorney general authority to bring an action in superior court both in the name of the state and on behalf of consumers and non-state

Representative Norman Murkowski
April 18, 2002
Page 2

governmental entities (which includes municipalities) for the recovery of both direct and indirect damages. It is a good piece of legislation that will benefit Alaskans and I encourage you to schedule it for a hearing and action.

I have enclosed a sectional analysis prepared by the Department of Law, as well as Representative Croft's sponsor statement. If you have questions, please feel to contact either me or Ed Sniffen in our consumer protection/antitrust section, at 269-5100.

Thanks for your attention.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL



By: Chrystal Stillings Smith
Legislative Liaison

Enclosures

Cc: Representative Eric Croft
Mike Abbott, Legislative Director, Office of the Governor
Ed Sniffen, Assistant Attorney General, Department of Law
Deborah Behr, Legislation and Regulations Attorney, Department of Law



Representative Eric Croft

HB 460 Sponsor Statement

In 1977, the US Supreme Court issued a ruling in a seminal antitrust case called *Illinois Brick Co. v. Illinois*. The case held that federal antitrust laws do not allow “indirect purchasers” to recover damages from “upstream” antitrust violators. The Court further held, however, that states are free to formulate their own public policy on the issue of anti trust lawsuits brought on behalf of indirect purchasers. Since the *Illinois Brick* decision, over 30 states have passed laws that allow recovery of damages by indirect purchasers under various state antitrust statutes. HB 460 would update Alaska antitrust statutes to allow the Attorney General to bring actions on behalf of indirect purchasers.

An indirect purchaser is a person who does not buy the suspect product directly from the wrongdoer. For example, suppose two drug manufacturers conspire to keep prescription drug prices high. A consumer who buys the drug from a pharmacy is an “indirect purchaser” because the pharmacy has not violated the antitrust laws. Currently, only direct purchasers, such as the distributor who bought directly from the drug manufacturer, have the option to bring suit for antitrust violations like price-fixing. Since these entities rarely pass on the overcharges they recover, indirect consumers don’t really benefit from the suit.

HB 460 also removes the requirement of proof of willfulness for treble damages, and provides for statistical methods of proof consistent with federal law. This allows the Attorney General to bring antitrust suits on behalf of Alaska’s indirect purchasers, under Alaska law in an Alaskan court, rather than federal court.

SECTIONAL ANALYSIS – HB 460

“An Act relating to actions for monopolies and restraint of trade, including proof of damages; amending Rule 82, Alaska Rules of Civil Procedure; and providing for an effective date.”

Section 1. AS 45.50.576 is amended as follows:

Sec. 45.50.576. Suits by persons injured; treble damages.

This section is being modified to remove the requirement that a defendant be found to have acted “willfully” before treble damages can be awarded. Removing this requirement will make this section consistent with other state and Federal antitrust acts. *See* 15 U.S.C. § 15a.

Subsection (b) is modified to remove duplicative language and make the section consistent with the new section added below.

Section 2. AS 45.50 is amended to add a new section as follows:

Sec. 45.50.577. Enforcement by attorney general.

This new section will accomplish several things. Currently, the State of Alaska, through the attorney general, is without authority to bring an action on behalf of consumers for “indirect damages.” Indirect damages are damages that a consumer may suffer because of an antitrust violation that occurred “upstream” from the consumer transaction. For example, when a consumer purchases drugs from a pharmacy, the price may be artificially high because of an illegal deal made between two competing manufacturers. The price increase that results from this illegal agreement is passed down to the wholesaler, then to the distributor, then to the retailer, who finally passes the increase to the consumer.

The entity “directly” harmed in the above scenario is the wholesaler who bought the drugs directly from the manufacturer. Thus, under current antitrust law, the only person who can bring an antitrust action against the manufacturers is the wholesaler, or other persons who bought directly from the manufacturer (some state agencies make these direct purchases). This rule of law was enunciated in a U.S. Supreme Court decision called *Illinois Brick Co. v. Illinois*. That case left

open, however, the opportunity for individual states to enact their own laws that would allow the recovery of these “indirect” damages under state-specific antitrust statutes. In response to this case, several states have enacted such laws, called “*Illinois Brick* repealer” statutes because they repeal the effect of the *Illinois Brick* decision.

Alaska has been involved in several multi-state antitrust actions in the last several years. Ever since the tobacco litigation, states’ attorneys general have cooperated with each other to bring these actions against antitrust violators for various kinds of illegal antitrust conduct. The claims Alaska has been able to assert in these cases, however, are limited to claims on behalf of state agencies that have been directly harmed by the alleged illegal conduct. We have limited and questionable authority to make claims on behalf of consumers for their “indirect purchases” of drugs and other products. For example, Alaska lost out on several hundred thousand dollars in consumer relief recently in the “Vitamins” case. That case involved allegations of illegal contracts between vitamin manufacturers. Alaska was initially excluded from the settlement because we did not have an “*Illinois Brick* repealer.” We eventually received about \$100,000, while other states that had such a statute received about \$1 million.

This section provides that the attorney general can bring an action in superior court in the name of the state, and on behalf of consumers and nonstate governmental entities (which includes municipalities) for the recovery of both direct and indirect damages.

Subsections (a) through (c) accomplish the above.

Subsections (d) and (e) allow the recovery of costs, full reasonable attorney’s fees, and treble damages if the state is the prevailing party.

Subsections (f) and (g) require publication of the proposed action and an opportunity for a person or nonstate governmental entity to elect to be excluded from the action. Any judgment issued in the action precludes claims by anyone who does not elect to be excluded.

Subsection (h) provides that any action brought under this section cannot be dismissed without approval of the court.

Subsection (i) provides that any recovery under this section must be distributed in accordance with court instructions, and requires that everyone on

whose behalf the action was brought be given an opportunity to recover the participant's appropriate portion of the proceeds.

Subsection (j) provides that the attorney general can recover aggregate damages using accepted sampling methods approved by the court.

Section 3. AS 45.50.50 is amended by adding a new section as follows:

Sec. 45.50.579. Actions for indirect injury.

This section allows only the attorney general to bring actions for indirect injuries. This is also consistent with other state statutes that have enacted these "*Illinois Brick* repealers."

Section 4. AS 45.50.596 is amended as follows:

Sec. 45.50.586. Judgment in favor of the state as evidence in another matter.

This section is being modified to conform with the above changes.

Section 5.

AS 45.50.596 is amended by adding a new paragraph (4) that adds a definition of "nonstate governmental entity."

Sections 6 through 9:

These sections are procedural and address: (1) modification of the Court Rules to recognize the state's authority to receive full reasonable attorney's fees; (2) the effective date; and (3) the requirement that a two-thirds majority is required for passage of AS 45.50.577 (dealing with amendment of the Court Rules) to take effect.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 460
(H) Publish Date: 4/18/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
Title: "An Act relating to actions for monopolies and BRU Civil Division
restraint of trade, including proof of damages; amending . . ." Component Fair Business Practices
Sponsor: Representative Croft
Requester: House Labor and Commerce Committee Component No. 2206

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Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()	*****	*****	*****	*****	*****	*****
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

HB 460 updates Alaska antitrust statutes consistent with a recent United States Supreme Court precedent to allow the attorney general to bring a cause of action on behalf of both direct and indirect purchasers. Current Alaska statutes allow a cause of action only for purchasers who buy directly from the person or manufacturer that violated antitrust statutes. Because these type of actions typically involve civil actions on behalf of numerous persons and sometimes on behalf of numerous governmental entities, the bill provides for proof of antitrust damages by way of statistical methods consistent with federal law. The bill also removes the current requirement in the antitrust statutes that any antitrust plaintiff must prove willful conduct before a court may award treble damages. Federal law does not have this requirement, encouraging plaintiffs to resolve issues important to Alaska businesses and consumers in federal court, rather than state court.

Costs and revenues associated with passage of this bill will depend on the number and complexity of actions brought by the attorney general in any given year. Both are too speculative to quantify at this time.

Prepared by: Joan M. Kasson Phone (907) 465-5370
Division: Attorney General's Office Date/Time 4/11/02 3:57 PM
Approved by: Kathryn Daughettee for Bruce M. Botelho, Attorney General Date 4/11/2002
Agency: Department of Law

PROPOSED *ILLINOIS BRICK* REPEALER TO ALASKA ANTITRUST STATUTE

OVERVIEW

In a case called *Illinois Brick*, the U.S. Supreme Court said that under federal antitrust law, only direct purchasers could bring suits to recover for damages resulting from an antitrust conspiracy. The much-criticized *Illinois Brick* decision left indirect purchasers—typically consumers such as gasoline purchasers or contact lens purchasers—without any remedy for antitrust damages since these consumers don't typically purchase products directly from the manufacturer, but instead by from a wholesaler, retailer, etc. To remedy this situation, several states decided as a matter of state law to enact legislation called "*Illinois Brick* repealer statutes" so that under state antitrust laws, consumers would have a remedy for antitrust overcharges. California led the way with an *Illinois Brick* repealer statute in a case known as the *ARC America* case. In this case, the U.S. Supreme Court heard a challenge brought by manufacturers in a nationwide price-fixing conspiracy involving cement products to the authority of the attorneys general of Alabama, Arizona, California and Minnesota who brought suits under their new *Illinois Brick* repealer statutes on behalf of their states' indirect purchasing consumers. The U.S. Supreme Court, in a landmark decision, held that states are free to formulate their own public policy on this issue and the Supremacy Clause does not preclude states from granting indirect purchasers an antitrust remedy that federal law does not allow.

In the wake of the *Illinois Brick* and *ARC America* cases, many states have updated their antitrust laws by enacting *Illinois Brick* repealer statutes. Alaska's antitrust laws were enacted in 1975, and have not been updated to provide a right of action for indirect purchasers. The legislation proposed would update Alaska law to allow Alaska indirect purchasers protection from antitrust violations through representation by the Alaska Attorney General's Office in a *parens patrie* action. Indirect purchasers could be the state, municipalities, small and large businesses, and individual consumers that all made indirect purchases of goods and services, etc., that were inflated in price as a result of an antitrust conspiracy. An *Illinois Brick* repealer statute is especially important in Alaska because of the volume of goods and services that are consumed by Alaskans from outside the state that are purchased indirectly from wholesalers and suppliers. Without this legislation, there will be no clear remedy under the state's antitrust statute for indirect purchasers.

FACTORS SUPPORTING ALASKA *ILLINOIS BRICK* REPEALER

- No Remedy Without the proposed legislation, indirect purchasers that are typically consumers, small businesses, municipalities and the state will have no clear economic remedy under the Alaska Antitrust Statute for price-fixing conspiracies. Instead, indirect purchasers will have to rely on direct purchasers to bring suit and stop the price fixing. Since direct purchasers rarely pass on the overcharges they recovery, indirect purchasers are usually not economically made whole for the damages from the conspiracy.
- No Clogged Courts Since only the attorney general in a *parens patrie* action will be able to bring suit on behalf of the indirect purchasers, there is no risk with this legislation of multiple lawsuits.
- Alaska Courts Deciding Alaska Cases The proposed legislation removes the barrier to allowing suits on behalf of indirect purchasers in Alaska courts by removing the requirement of proof of willfulness for treble damages, and providing for statistical methods of proof consistent with federal law. Rather than forcing plaintiffs into federal court, antitrust issues important to Alaskans can be decided under Alaska law in an Alaska court, rather than federal court.
- Participation in Multistate Cases The attorney general often participates in Multistate antitrust cases with other states' attorneys general on behalf of consumers. In these cases, Alaska law is applied. This legislation will make clear that under the Alaska Antitrust Statute, the attorney general can participate fully and recover potentially millions of dollars for Alaska indirect purchasers.

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ALASKA PUBLIC RADIO NETWORK

26Grant

Hitchcock

APRN/PKG

3/26/02

TWO AID AGENCIES RECEIVED GRANTS TODAY AS PART OF A SETTLEMENT AGAINST SIX VITAMIN MANUFACTURERS ACCUSED OF PRICE FIXING. THE 4.4 MILLION DOLLAR SETTLEMENT IS BEING DISTRIBUTED AMONG SEVEN STATES. KIDS' KITCHEN AND FOOD BANK OF ALASKA BENEFIT FROM THE SETTLEMENT, BUT AT THE SAME TIME THE SETTLEMENT HIGHLIGHTS A PROBLEM WITH ALASKA LAW. ALASKA COULD HAVE RECEIVED MUCH MORE OF THE SETTLEMENT MONEY. APRN'S BONNIE-SUE HITCHCOCK HAS THE STORY:

The 4.4 million dollar settlement against six vitamin companies is the outcome of a lawsuit filed by seven states -- Alaska, Connecticut, Kentucky, Ohio, Oklahoma, South Carolina and Utah. The lawsuit alleges that vitamin manufacturers engaged in a ten year conspiracy to fix the price and allocate the markets for vitamins and vitamin sales in the US. Alaska's share in the settlement was \$95, 956 dollars. Ed Sniffen, Assistant Attorney General for the state of Alaska's Fair Businesses practices section, says that Alaska could have received as much as a million dollars more, if it had an "indirect purchasers statute" in place:

(Indirect purchasers :36) Some of the other states have laws that enable them to sue for indirect purchasers which are purchasers who don't actually buy from the "bad" people. In th's case the vitamin manufacturers. When you go out and buy the food that has these vitamins in them, then you become an indirect purchaser because you bought from a retailer who bought from a supplier who bought from a distributor who probably then bought from a manufacturer. And the US Supreme court has said that if you are one of those indirect purchasers then you can't recover under our anti-trust laws for these kinds of damages unless your state has enacted a law that allows you to do that"

Defendants in the trial argued that Alaska could not settle for indirect purchasers without having the statutes on the books. But Sniffen says the State could settle for agencies that made direct purchases:

(Sniffen 2 :17) We had some state agencies that purchased foods with these vitamins in them and we got a certain amount of money for those direct purchases but in order to get money for those indirect purchasers we had to argue very strongly that our statues could be interpreted to allow this".

HB 460 is an indirect purchasers statute that was introduced by Democrat Eric Croft. The bill has only undergone first reading and is still waiting for a co-signer in the legislature. Sniffen says the bill, if passed, would act as insurance for Alaska in the future when these kinds of cases arise:

(sniffen 3 :10) We're trying to get that bill through, it's really a win-win situation for everyone, in these types of big cases it would enable us to recover more money for folks in Alaska.

Food Bank of Alaska and the Kids' Kitchen couldn't agree more. Those agencies were chosen to receive part of the settlement in the form of grants by the State Attorney General's office, because they qualified under the court-ordered settlement agreement and because they distribute food to needy Alaskans. Susanna Morgan accepted the \$22,000 grant on behalf of the Food Bank of Alaska, an agency which has been distributing food to soup kitchens, daycares and other agencies in Alaska since 1979 :

(morgan :25) Food Bank of Alaska distributed over 30 millionth pound of food last year. We're up to 33 million pounds of food. ...This money will distribute 50,000 pounds of nutritious food to hungry Alaskans.

Kids Kitchen serves food to low income children and has served over 350,000 meals since 1996. Elgin Jones accepted the 10,000 dollar grant on behalf of Kids' kitchen:

(Jones :17) What this 10,000 dollars will do for the summer.....and we can do a lot with this for the kids.

The checks were presented to Morgan and Jones by Lieutenant Governor Fran Ulmer. Ulmer says that statistics show 1 in 5 children and 1 in 10 adults in Alaska are at risk of going to bed hungry every day

Ulmer : 17 So it is really an extraordinary day when we can take money from two lawsuits from 6 companies that engaged in a ten year practice of illegal behavior, and take that money and provide it to two organizations that really do their best to help Alaskans.

According to the attorney general's office, the rest of the money will be deposited into the general fund for distribution to govt. entities that made indirect purchases of vitamin products. It will also be used to cover costs for consumer protection and antitrust investigations.

Proposed Consumer Protection/Antitrust Legislation

Purpose: To amend Alaska antitrust laws to specifically authorize the state to seek restitution for indirect purchasers as a result of illegal acts of remote suppliers

Background: In the course of investigating potential antitrust claims, the Department of Law has determined that Alaska law could be improved by clearly authorizing the state to seek restitution for indirect purchasers (for instance, retail consumers of prescription drugs and other products, governmental entities, government-funded service providers, and state businesses) as a result of harm caused by illegal acts of remote suppliers. Under current Alaska antitrust statutes, indirect purchasers are without any remedy for antitrust injuries.

A simple change to Alaska statutes that would specifically authorize a right of action by the state on behalf of indirect purchasers would remove any ambiguity about the state's authority to proceed in its own cases and to participate in multistate cases brought against suppliers of drugs, contact lenses, and other products. This is known as an *Illinois Brick* repealer statute, after a case in which the U.S. Supreme Court said that under federal antitrust law only direct purchasers could bring suits to recover for damages resulting from an antitrust conspiracy. Many states have enacted such repealer provisions.

See attached for additional information on the draft legislation.